

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Rudolfo Rios,
Complainant,
v.
Minnesota Department of Corrections,
Respondent

ORDER DENYING
MOTION FOR
NEW TRIAL

On April 21, 1997 a Findings of Fact, Conclusions and Order was issued dismissing Complainant's charges against Respondent. On May 2, 1997, Complainant filed a Petition for Reconsideration of that decision under Minn. R. 1400.8300 on the grounds that the decision is not justified by the evidence and is contrary to law. On May 12, 1997 Respondent filed its arguments opposing the motion. Complainant replied the same day. Neither party requested oral argument and oral arguments were not heard.

Reino J. Paaso, Attorney at Law, 310 Fourth Avenue South, Suite 400, Minneapolis, MN 55415 appeared on behalf of Complainant. Melissa L. Wright, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2128 appeared on behalf of Respondent.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED: That the Complainant's Motion for Reconsideration should be and it hereby is DENIED.

Dated this 11th day of June, 1997

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

Minn. R. 1400.8300 (1995) permits rehearing or reconsideration on the grounds asserted by Complainant. It states, in part:

* * *

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or rehearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

* * *

F. the decision is not justified by the evidence, or is contrary to law; but unless it be so expressly stated in the order granting rehearing, it shall not be presumed, on appeal, to have been made on the ground that the decision was not justified by the evidence.

Subpart F mirrors rule 59.01 (g), Minn. R. Civ. P. which relates to new trials.

Under the rule, a new trial should be granted where the evidence is not legally sufficient to sustain the decision or the decision is contrary to law. Complainant's position apparently is that the record requires a decision in his favor as a matter of law. His arguments are based on seven evidentiary items.

First, Complainant argues that a finding of pretext is required because of the "inference of discrimination" and the "alternating reasons" given for his discharge. That argument is not persuasive. The "inference of discrimination" disappeared from the case when the Respondent articulated legitimate non-discriminatory reasons for Complainant's discharge. St. Mary's Honor Center v. Hicks __U.S. __, 113 S. Ct. 2742, 125 L.Ed. 2d 407, 62 F.E.P. 96 (1993). Hence, the inference cannot be used to meet Complainant's ultimate burden of proof. Inconsistencies in an employer's stated reasons for discharging an employee may evince discrimination. In this case, however, the so-called "alternating" reasons were not inconsistent. Rather, the individuals who evaluated Complainant did not have the same experiences with him and did not, therefore, have the same opinions and complaints about him. This reasonably would be expected given the Respondent's procedures for evaluating new employees as they rotated from one assignment to another. Furthermore, although the reasons set forth in the discharge letter should be thoroughly considered, the record shows that some of the concerns regarding Complainant's performance were not specifically addressed in that letter. For the most part, the record shows that the employer had dissatisfactions with Complainant's performance throughout the term of his probationary period and similar complaints were raised at the time of each evaluation. The Administrative Law Judge is not persuaded that the reasons proffered for his discharge were inconsistent or unreliable.

The Complainant argued that the reasons were inconsistent because not all of the reasons were included in his discharge letter. This does not persuasively establish pretext because the members of the review panel had different experiences with Complainant and each had their own reasons for voting not to certify him. Given the number of people who evaluated his performance and who ultimately voted on certification, it is not surprising that not all employee complaints about Rios were the

same or that some of the complaints did not end up in the termination letter drafted by Meyer.

Second, Complainant argues that Wilmes defamed him by telling McCormack that he was a convict ("ex-con"). This single act of allegedly differential treatment is sufficient, in Complainant's view, to sustain a finding of illegal discrimination under the holding in City of Minneapolis v. Richardson, 239 N.W.2d 197, 203 (Minn. 1976). In that case, a 12 year old boy was bitten by a police dog and dragged face down 20 to 30 feet to a squad car. In the car, police officers used racial epithets and made derogatory remarks about the boy and later threatened him with police dogs. The court held that a single act of discrimination by municipal police officer involving public services can be sufficient to fix liability under the Minnesota Human Rights Act. The court went on to adopt a standard defining unfair discrimination in the area of public services stating:

. . . A finding that an unfair discriminatory practice has occurred may be made when the record establishes (1) an adverse difference in treatment with respect to public services of one or more persons when compared to the treatment accorded to others similarly situated except for the existence of and impermissible factors such as race, color, creed, sex, etc.; or (2) treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation. * * *

There is no evidence of other, similar rumors like those which existed about Complainant's criminal history. Because there was no evidence regarding other, similar rumors there is no evidence that Rios was treated differently from other employees in the manner in which rumors were circulated or handled. Furthermore, there is no evidence that Wilmes treatment of the rumor regarding Complainant's criminal history was so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation. Wilmes told McCormack that Rios was a former convict and asked McCormack to speak to him because McCormack also was an ex-convict. Wilmes hoped that McCormack would be able to use his experience to help Complainant adjust to his role as a correctional officer. Wilmes had heard complaints that Complainant was spending too much time with Hispanic inmates and Wilmes felt that Rios might be having trouble adjusting to the role of a correctional officer. Wilmes actions were taken in good faith and were designed to help Rios. The Judge is not persuaded that Wilmes actions evince national origin discrimination. Unlike the boy in Richardson, Complainant was never the subject of any racially derogatory remarks.

The single incident of differential treatment Complainant relies upon to establish a finding of illegal discrimination is Wilmes allegedly defamatory statement to McCormack that Complainant was once an inmate. The Administrative Law Judge has no authority to resolve tort claims such as the defamation charges Complainant made in its Petition for Reconsideration, but may consider whether Wilmes' statement, if true, is sufficient to establish illegal discrimination. The Judge is persuaded that it isn't.

Assuming that the statement Wilmes' made to McCormack about Rios' criminal history constitutes slander, the record clearly and persuasively establishes that Wilmes' remarks were not made with actual malice; that is, with improper or unjustified motives. Furthermore, assuming that Wilmes statements constitute slander and were not subject to any privilege, the Administrative Law Judge is not persuaded that Wilmes' statements evince national origin animus. The evidence points strongly to a contrary conclusion.

Third, Complainant argues that he was treated differently from several nonHispanic correctional officers because some of those officers were considered to be performing satisfactorily with a score of two (2) while others, including Complainant were considered to need improvement if they received a score of two (2). This argument was previously considered and rejected. The most it shows is that some nonHispanic probationary officers were considered to be superior to others. The persons who completed the evaluations identified the superior employees by noting on their evaluation forms that even though they had received a score of two (2), which usually meant that they needed improvement, their performance was considered to be satisfactory. The evaluators could have decided, instead, to simply rate those employees with a different, higher score. The Administrative Law Judge simply is not persuaded that the manner in which these individuals were scored evinces discrimination. On some of Rios' evaluations, for example, a minus sign was added to a numerical score to indicate that his performance was slightly below that of other persons who received the same score. This is not a situation where some nonHispanic probationary officers received a more lenient standard of evaluation. Rather, in substance, they received a better evaluation.

Complainant also argued that when the review panel considered Lieutenant Thorsten's evaluation (Ex. 13) it violated its own procedure allegedly requiring evaluations to be based solely on objective data. This argument was addressed before and is not persuasive. It might be preferable to test correctional officers prior to final certification to assess their familiarity with facility regulations policies and procedures, for example. However, that is not required and the Administrative Law Judge is not persuaded that the certification panel's consideration of Thorsten's evaluation evinces a discriminatory motive. All employees were evaluated in the same manner and there is no evidence that the individual correctional officers who passed probation were evaluated using different criteria.

Complainant also argued that he was the only probationary CO whose evaluations were made on the basis of subjective feelings. Without unnecessarily belaboring the point, there is no evidence that the criteria used to evaluate the Complainant's performance -- whether properly termed subjective or objective -- were different than the criteria used to evaluate other members of his class. Complainant stated that how an evaluator "feels" about an employee's performance is irrelevant. However, an evaluator's opinion is based on the evaluator's observations and input from the evaluator's staff. Those opinions are relevant, and it is not true, as Complainant argued, that he was judged on the basis of unsubstantiated allegations. The incidents which formed the basis for the review panel's conclusions had a factual

basis. It is true that the dates when certain incidents occurred were uncertain, but the incidents themselves were sufficiently articulated to support the conclusions reached.

Complainant's fourth argument relates to the December 21, 1994 e-mail memo from Kelley to Meyer. (Ex. 9), which contains the time 10:02 p.m. Complainant argues that the exhibit should not have been received and that it was created after the fact. Complainant had ample opportunity to cross-examine Meyer about the memo and to present rebuttal evidence relating to its legitimacy from Kelley or other witnesses. Complainant did not do so and has not requested that a new trial should be granted due to errors of law occurring at the trial or some other theory which would require a new trial due to the admission of that exhibit (Ex. 9).

The record shows that Complainant worked from 2:00 p.m. to 10:00 p.m. on December 19th (Ex. 36), and there is no evidence that the memo is fraudulent in any respect. Testimony at the hearing shows that Lieutenant Kelley had more contacts with the Complainant in December which led him to change his opinions regarding the adequacy of Complainant's performance. If the memo had not been received, the Administrative Law Judge's conclusions would not change.

Complainant also raised a different argument stating:

* * * The content of the memo was contradicted by Lt. Kelley's mid-probationary evaluation of Complainant (Ex. W). Off. Wysocki testified that the incident referred to in the memo happened early in Complainant's probation and not in December as the Respondent claims. Lt. Kelley's signed evaluation (Ex. W) should be given far more weight than this memo of dubious origin. Off. Wysocki testified he assisted only one person, Complainant, in the manner described in the Kelley memo (out on the perimeter) and that he did that before his mid-probationary evaluation. This is corroborated by the note made by Lt. Kelley on his mid-probationary evaluation of Off. Wysocki. (Ex. FF). * * *

This argument is confusing because the December 21st memo from Kelley to Meyer does not mention any specific incident and there is no reason to believe that it refers to the prior incident involving Officer Wysocki. Complainant's arguments relating to this matter simply are not persuasive.

Complainant's fifth argument is that the Respondent knowingly provided the court with a false document "when it presented Exhibit II as a draft copy, and Pat Meyer lied when she said it was only a draft copy." Complainant's arguments are based on an evaluation of David Hagglund, a probationary CO like Complainant. On Hagglund's evaluation for the period ending October 31, 1994 (the mid-evaluation), -- marked "Draft copy" -- Hagglund's overall performance was rated satisfactory even though his performance level in six areas was rated as "Minimally Meets Standards." Ex. I I. Subsequently, Meyer prepared a second, typed evaluation for the mid-probationary period (Ex. 17) rating Hagglund's overall performance marginal. Complainant argues that Ex. I I was falsely marked as a draft copy and that Meyer lied when she testified

that it was. To support his argument, Complainant points out that the second, typed performance review is undated and wasn't signed by Hagglund. Complainant also presented an affidavit from Hagglund stating that he was never told exhibit II was a draft and was never shown any other performance review for the mid-evaluation.

Complainant's arguments are not persuasive because it was not unusual for Meyer to prepare more than one evaluation. For the mid-performance review the record contains a hand-written performance evaluation signed only by Rios, a second hand-written evaluation signed by Meyer and Rios, and a third, typed evaluation signed only by Meyer and the acting warden. Exs. R, R2 and S. It appears that Meyer's policy may have been to prepare a final, typed performance review. See, e.g., exhibit O O. On the other hand, she may simply have been inconsistent or sloppy. In any event, the Administrative Law Judge is not persuaded that Meyer falsified documents or lied. Furthermore, no weight can be given to Hagglund's affidavit. Any testimony from him should have been presented at the time of the hearing. Under Minn. R. 1400.8300 C. a new trial may be granted to consider "material evidence newly discovered that with reasonable diligence could not have been found and produced at the hearing." Complainant has not requested a new trial based on newly discovered evidence and simply may not supplement the record with affidavits or other new evidence. Even if that were not true, Hagglund's affidavit carries little weight because he failed to pass probation and likely may be hostile toward the Respondent. The fact that Hagglund did not sign the final, typed performance evaluation for the mid-probationary period, even if considered, is inconsequential because Hagglund did not sign his final performance review even though it was reviewed with him. Ex. 23.

Complainant's sixth argument relates to testimony presented by Sergeant Jerry Fetsch. Fetsch testified that Complainant entrusted some keys and a radio to an inmate. However, he could not recall whether he reported that incident or if he had, to whom it had been reported. At the hearing, evidence was presented that this incident was unknown to the review panel and was not a factor in its decision not to certify Complainant. Hence, it was not considered in the Judge's decision. There is no persuasive evidence in the record that Fetsch was biased toward Complainant or that his testimony should not be credited. New arguments raised by Complainant in its motion, which are based on a deposition, will not be considered because the deposition is not in evidence. If Complainant needed to have testimony from Lt. Zuk, Complainant should have called him as a witness.

Complainant's final argument in support of his motion relates to Complainant's speaking Spanish on the job. Complainant's arguments on this issue are unpersuasive. He correctly points out that there is no evidence indicating that a Spanish speaking CO is more likely to be set-up than an English speaking CO. However, that argument was never made. The argument was that Complainant's co-workers would not be in a position to intervene to keep Complainant from being set-up if they did not know what was being said by Complainant and the Hispanic inmates. The staff who worked with Complainant wanted him to speak English so that they could monitor the substance of his conversations with Hispanic inmates and offer advice to

him if needed. The Administrative Law Judge is not persuaded that conversations relating to Complainant's use of Spanish evince any national origin animus whatsoever.

After reviewing the arguments and records, it is concluded that the Complainant's motion should be denied. The evidence fails to establish, by a preponderance of the evidence, that Complainant's national origin was a factor in the review panel's decision not to certify him for permanent employment.

J.L.L.